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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 885

NATHANIEL G. GRAVES, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Nathaniel G. Graves respectfully petitions by his counsel, Bradshaw & Bradshaw, (consisting of John Bradshaw and Donald R. Bradshaw), and Adolph D. Pavlicek, for a writ of certiorari to review a decision of the Court of Criminal Appeals of the State of Texas, —S.W. 2d—, (not yet reported), rendered December 16, 1959, which affirmed a judgment of conviction on a charge of misdemeanor theft resulting from a trial in the County Court at Law No. 3 of Harris County, Texas, and the decision of the said Court of Criminal

Appeals of the State of Texas rendered on January 27, 1960, overruling the Appellant's Motion for Rehearing without written opinion.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked because it is believed by the petitioner that the above mentioned decision of the Court of Criminal Appeals of the State of Texas, dated and entered December 16, 1959, denied the petitioner his rights of due process and that accordingly, a federal question of substance was decided by said Court in a way not in accord with applicable decisions of the Supreme Court, or, in the alternative, a federal question was decided by said Court which particular federal question has not been, but should be, decided by the Supreme Court, which question shall be fully discussed at a later point in this petition.

The said Court of Criminal Appeals of the State of Texas overruled the "Appellant's Motion for Rehearing" without written opinion on January 27, 1960, and granted an order staying the issuance of the mandate in said cause together with all other proceedings against the appellant for a period of ninety days to permit the petitioner to apply to this Court for a writ of certiorari, which said order staying the mandate was dated and entered the 28th day of January, 1960.

The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is the *United States Code Annotated*, Title 28, Section 1257(3).

Questions for Review

The questions presented for review are whether the petitioner has been deprived of his constitutional and statutory rights and been convicted as a result of a lack of due process in the instant case. The facts of the case being such that the State relied upon circumstantial evidence alone and introduced evidence taken from the petitioner's home without a search warrant claiming consent by the accused. The petitioner asserts that by violating the provisions of the constitutions and statutes quoted in the next paragraph the State has deprived him of his constitutional rights and that he has been denied the right of due process.

Constitutional and Statutory Provisions Involved

Amendment IV of the *Constitution of the United States* relating to Searches and Seizures is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the State of Texas, Article I, BILL OF RIGHTS, Section 9, Searches and Seizures, found on Page 4, of Vernon's Constitution of the State of Texas Annotated, Volume 1, is as follows:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any

> place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

Vernon's Annotated Code of Criminal Procedure of the State of Texas, Volume 2, Title 8, Section 727a entitled Evidence Not To Be Used, found on page 208 of the 1959 cumulative annual pocket part of said volume is as follows:

> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

Statement of the Case

The petitioner, Nathaniel G. Graves, an adult negro male, was convicted in the County Court at Law No. 3 of Harris County, Texas, of the offense of misdemeanor theft of a radio of a value of less than $50.00 on March 19, 1959, and sentenced to 30 days confinement in jail. He was arrested in front of his home by officers of the Jacinto City, Texas, police department who had waited there for him to return home from work on the evening of December 8, 1958. (R. p. 148). He was then taken to the Jacinto City, Texas, jail and held for some time before he was taken by some three Jacinto City police officers and returned to his home while under arrest and in their custody whereupon a search of the premises was made. (R. p. 153). A radio was found in his home which was later introduced into evidence at his trial over objection. The State relied entirely upon circumstantial

evidence. The State also admitted that they had not secured a search warrant prior to the search. (R. p. 153). They relied upon an alleged consent or waiver by the accused of his constitutional and statutory rights. R. p. 154).

The accused objected to a question first asked by the State as to how the police gained entrance to his home on the grounds that he was under arrest and that no warrant had been obtained when the issue first arose in the trial court. (R. p. 142). The trial Court overruled said objection and an exception was taken. At each time similar questions were asked of the State's witness, police officer Daniel T. Norris, pertaining to the search of the petitioner's home and the seizure of the radio in question, objections were made based on the illegal search and the trial court consistently overruled said objections and exceptions were taken. (R. pp. 143, 145, 146, 155, 156). The petitioner objected to the offer of the radio in evidence on the basis of the lack of a search warrant and the objection was overruled, and an exception to the ruling taken. (R. p. 158).

The State admitted that a search warrant had not been obtained even though required by the constitutional provisions and stautes above set out. (R. p. 153). The only evidence in the record which could be relied upon by the State to attempt to show waiver or consent by the petitioner was testimony by the witness, officer Norris, wherein he said the accused took the police officers to his home (R. p. 150) and offered to let them in his home (R. p. 152) and this witness admitted upon cross-examination that the accused was under arrest and had no choice but to go with the officers; that he could not

have taken them. (R. p. 152). The petitioner testified that the search and seizure was without his consent. (R. pp. 165, 166).

The issue of the lack of due process being afforded the petitioner at his trial as a result of the illegal search and seizure and the admission into evidence at his trial of the illegally obtained evidence was made a major basis of his appeal to the Court of Criminal Appeals of the State of Texas. The petitioner's bills of exception numbered 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 24, 25, 26, 27, 30, 33, 34, 42 and 43, all pertained to alleged error in the trial court on the issue of the search of the petitioner's home without a search warrant, the resultant seizure of the radio and its admission into evidence, and the court's rulings on the objections thereto. These bills of exception were presented in the brief for the appellant in said court which has been certified as a part of the record in this case from page 10 to page 37, and is incorporated herein by reference.

Argument

The protection afforded an accused under the Fourth Amendment to the United States Constitution as well as the constitution and statutes of the State of Texas is to be liberally construed in his favor.

Wrightson v. U. S., 1955, 222 F. 2d 556, 95 U.S. App. DC 390;
Catalanotte v. U. S., CA Mich., 1953, 208 F. 2d 264;
Gilbert v. U. S., CCA Okl. 1944, 144 F. 2d 568.

Exploratory searches solely to find evidence of guilt are not permissible with or without a warrant.

U. S. v. Rabinowitz, USNY, 1950, 70 S. Ct. 430, 339 U.S. 56, 94 L. Ed. 653, Certiorari denied 70 S. Ct. 188, 338 U.S. 886, 94 L. Ed. 544;
U. S. v. Guido, CA Ill., 1958, 251 F. 2d 1, Certiorari denied 78 S. Ct. 915, 356 U.S. 950, 2 L. Ed. 2d 843.

Where the authorities have not obtained and served a search warrant upon the accused in accordance with the law it is necessary that the intent to waive the constitutional immunity must be positively established, and waiver or consent must be shown by convincing, clear and convincing, or clear and positive evidence, and the burden of proof rests on the party alleging the waiver. In order to constitute a waiver it must be clearly shown that consent given to an otherwise illegal search was voluntary, that is; that it was free from coercion, duress, or fraud, and not given merely to avoid resistance. Since the constitutional guaranty is not dependent on any affirmative act of the citizen, the courts do not place the citizen in the position of either contesting an officer's authority by force or waiving his constitutional rights, but instead they hold that a peaceful submission to a search or seizure is not a consent or an invitation thereto, but is merely a demonstration of regard for the supremacy of the law. It is not a waiver of objection to the illegal search, or a waiver of a valid warrant, or a waiver of the constitutional guaranty.

Watson v. U. S., CA 1957, 249 F. 2d 106, 101 U.S. App. DC 350;
U. S. v. Kidd, DC La. 1957, 153 F. Supp. 605;
U. S. v. Reckis, DC Mass. 1954, 119 F. Supp. 687;
U. S. v. Rembert, DCSD Tex., 284 F. 996.

The facts shown by the record in the instant case do not show a waiver of the accused's constitutional and

statutory rights by the required clear, convincing and positive proof which was the burden on the State. There is at most, a mere hint at the required consent. This evidence was not even sufficient for court to charge the jury on the question of illegal search and seizure; rather the trial court should have ruled as a matter of law the burden upon the State to prove the consent by positive evidence had not been sustained and directed a verdict of "Not Guilty".

Judd v. U. S., 190 F. 2d 649;
Agnello v. U. S., 269 U.S. 20, 46 S. Ct. 4, 6, 70 L. Ed. 145.

If evidence can be obtained without a search warrant as in this case in violation of the constitutional and statutory guaranties of a person's rights, and then be used in evidence against him in a criminal trial, the provisions of the constitutions and our laws might as well be stricken from the record.

Weeks v. U. S., 232 U.S. 383, 34 S. Ct. 341, 344, 58 L. Ed. 652, L.R.A. 1915B, 834 Ann. Cas. 1915C, 1177.

It is respectfully submitted that where the State statutes and constitution in addition to the federal constitution require that a search warrant be obtained and served upon an accused person or other person before a search of his home is to be permitted, and that in the absence of such search warrant, no evidence thus illegally seized may be used in a criminal proceeding against him, and the State fails to meet the required test of showing a free and voluntary consent and waiver of these constitutional

and statutory guaranties but such evidence is admitted and upon the strength thereof the accused is convicted the conviction is without due process of law. It has been held that strict compliance with all essential formalities is necessary to constitute a proceeding by due process of law.

Spurgeon v. Commonwealth of Virginia, 10 SE 979, 86 Va. 652.

This honorable Court has held "that which the law makes essential in proceedings involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

Hopt v. Utah, 110 U.S. 574, 4 S. Ct. 202.

It is submitted that a conviction under these circumstances obtained by the use of evidence secured in violation of the accused rights and in violation of the constitutional and statutory rights guaranteed to him is void.

Roberson v. U. S., CCA Tenn. 1948, 165 F. 2d 752.

Prayer

WHEREFORE, premises considered, petitioner prays the Court to grant the writ of certiorari to the Court of Criminal Appeals of the State of Texas and set this cause for a hearing in order that justice may prevail and for

such other relief as the petitioner may show himself justly entitled upon a hearing hereof.

Nathaniel G. Graves, Petitioner

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and,

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Of Counsel:

ADOLPH D. PAVLICEK

DONALD R. BRADSHAW

State of Texas
County of Harris

Proof of Service

We, the undersigned, do hereby certify that a true and correct copy of this Petition for Writ of Certiorari has been served upon Leon Douglas, Attorney for the State of Texas, at Austin, Texas, by depositing this date in the United States Post Office at Houston, Texas, said copy properly addressed to said counsel with first class postage prepaid and that said address is not more than 500 miles from Houston, Texas.

Dated this _____ day of April, 1960, A. D.

BEFORE ME, the undersigned authority, on this day personally appeared Donald R. Bradshaw, who after being by me first duly sworn, deposes and upon oath states that the above signed proof of service is true and correct.

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Donald R. Bradshaw, this _____ day of April, 1960, to certify which witness my hand and seal of office.

_____

Notary Public in and for
Harris County, Texas.

APPENDIX

MINUTES OF THE COUNTY COURT AT LAW NO. 3 OF HARRIS COUNTY, TEXAS

At February Term, 1959

THE STATE OF TEXAS §
§ DATE March 19th, 1959
VS. NO. 134334 §
§ OFFENSE (Misdemeanor)
Nathaniel G. Graves §
§ Theft

This day this cause was called for trial, and the State appeared by her District Attorney, and the defendant Nathaniel G. Graves appeared in person and by counsel, and both parties announced ready for trial; and the said defendant Nathaniel G. Graves in open court pleaded not guilty to the charge contained in the information herein, and thereupon a jury to-wit: Mrs. Henry Shorts and five others, was duly selected, empanelled and sworn, who, having the Information read and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the defendant being present and in due form of law March 20th, 1959 returned into open Court the following verdict, which was received by the Court and is here not entered upon the minutes, to-wit: "We, the jury find the defendant guilty as charged and assess his punishment at 30 days in jail.

Mrs. Henry Shorts, Foreman."

It is, therefore, considered, ordered and adjudged by the Court that the Defendant Nathaniel G. Graves is guilty of the offense of theft a misdemeanor, as charged, and that the State of Texas do have and recover of the said defendant all costs of this prosecution, and execution may issue against the property of the said defendant for the amount of said costs: and the said defendant, being now present in court, be committed to the custody of the Sheriff, who shall forthwith confine him in the jail of Harris County for a period of Thirty days, and until said costs are fully paid.

— — — — — — —

RECORDED: VOLUME 8, PAGE 620 JUDGMENT MINUTES COUNTY COURT AT LAW NO. 3 OF HARRIS COUNTY, TEXAS.

— — — — — — —

COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

NATHANIEL G. GRAVES, Appellant

No. 31,186 Appeal from Harris County

THE STATE OF TEXAS, Appellee

OPINION

The appeal is from a conviction for theft of a radio of the value of over $5.00 and under $50.00; the punishment, 30 days in jail.

Appellant was an employee of Keystone Wholesale Jewelry Company in Houston, of which Gordon, the alleged owner, was manager.

Mr. Gordon testified that after closing on December 6, 1958, he checked his Motorola transistor radios and found 19.

The following day, being Sunday, the store was closed but Mr. Gordon, his wife and several employes, including appellant, worked with the merchandise.

After his employees had left the building Mr. Gordon again checked the Motorola transistor radios and found only 17. An investigation began.

Appellant was arrested near his home and taken to the police station. Later he accompanied officers to his home where a Motorola transistor radio with serial number 54790 was recovered.

Mr. Gordon identified the radio as one missing from the Jewelry Company, relying upon an invoice listing

among 18 radios one with Serial Number 54790 preceded by the letter "O" or "D". He explained that the invoice was written up by the shipper and not the maker.

Daniel T. Norris, Assistant Chief of Police of Jacinto, Texas, testified that appellant was arrested by other officers and brought to the police station where he talked with him; that "we were investigating another party", that as a result of this conversation he went to appellant's home." . . . the defendant took us to his home and let us in the house and went in with us. . . . He offered to let us in his home."

Officer Norris further testified that appellant started pointing out items "that belonged to . . . "and in the bedroom appellant gave him the radio offered in evidence and said "this belongs to Mr. Gordon."

Appellant testified at his trial and said that the radio which the officers found in his home was one he had purchased at wholesale at the Keystone Wholesale Jewelry Company and had given to his wife. He denied that he handed the radio to Officer Norris or that he consented to the officers' entry into his home. His version was that he was taken there handcuffed and that his home was searched without his invitation or consent.

The issue was submitted to the jury in the court's charge and the jury was instructed that if they had reasonable doubt that the defendant gave his voluntary consent to the search of his home, or believed he did not consent, to acquit.

The jury resolved the issue against the defendant and there is sufficient evidence to sustain their finding that appellant consented to the entry of his house.

We are unable to agree with appellant's contention that the consent of one who is under arrest is not sufficient to authorize a search of his home. We are aware of no holding to that effect by this Court.

It should be noted that question is raised as to the legality of the arrest of appellant, and no objection based upon the contention that he was under unlawful restraint is found in the record.

Appellant urges that there is a discrepancy between the description of the missing radio and the radio recovered from appellant because the letter appearing before the serial number on the invoice was not on the radio recovered.

Appellant's statement to the officer that the radio he handed him belonged to Mr. Gordon, and his testimony that it came from the same stock, was sufficient to remove any question as to the admissibility of the radio recovered insofar as any discrepancy in its identification by serial number was concerned.

We overrule the contention that such statement of the appellant to Officer Norris was inadmissible because he was under arrest. The radio proved to be one missing from the Jewelry Company, a fact unknown to the officer before the statement was made. It was admissible under the exception in Art. 727 C.C.P., the statement being found to be true. *Sweat v. State*, 115 Tex. Cr. R. 130, 29 S.W. 2d 756; *Hayes v. State*, 85 Tex. Cr. R. 433, 213 S.W. 664.

The appellant complains of certain remarks attributed to counsel for the State in argument. The bills of exception relied upon merely set out a portion of appellant's motion for new trial wherein he sets out the remarks complained

of and his objection thereto. There is no certification in the bills that the complained of remarks were in fact made, as stated in the objection and motion, and the argument made does not appear elsewhere in the record. The bills of exception show no error. *Hernandez v. State*, 159 Tex. Cr. R. 178, 262 S.W. 2d 200.

Other bills of exception seek to complain of jury misconduct and quote from the motion for new trial.

Nothing is presented for review in regard to jury misconduct for the reason that the motion for new trial alleging such was not sworn to or supported by affidavit. Grabble v. State, 79 Tex. Cr. R. 558, 186 S.W. 771; Hicks v. State, 75 Tex. Cr. R. 461, 171 S.W. 755; Vyvial v. State, 111 Tex. Cr. R. 111, 10 S.W. 2d 83; Clay v. State, 157 Tex. Cr. R. 32, 246 S.W. 2d 180; Allala v. State, 157 Tex. Cr. R. 458, 250 S.W. 2d 207; Hicks v. State, 158 Tex. Cr. R. 45, 251 S.W. 2d 409; Roberson v. State, 160 Tex. Cr. R. 381, 271 S.W. 2d 663; Burris v. State, 161 Tex. Cr. R. 210, 276 S.W. 2d 260.

The judgment is affirmed.

Woodley, Judge.

(Delivered December 16, 1959.)